In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1697

PACIFIC MARITIME ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-30) is reported at 457 F. 2d 572. The opinion and order of the district court (Pet. App. 32-34) are not reported. The decision and order of the National Labor Relations Board in the related proceeding under Section 10(k) of the National Labor Relations Act are reported at 181 NLRB 315.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1972, and a timely petition for rehear-

ing was denied on April 26, 1972. The petition for a writ of certiorari was filed on June 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a dismissal of an unfair labor practice complaint against a union is reviewable by the court of appeals when the complaint, which charged the union with improperly engaging in strike activity to enforce its demands in a jurisdictional dispute, has been mooted by the Board's determination that the union's members were entitled to the work at issue.

2. Whether the Board's denial of a stay of its determination in favor of one of the parties to a jurisdictional dispute is reviewable by the court of appeals.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 1-7.

STATEMENT

In April, 1969, Brady Hamilton Stevedore Co. and W. J. Jones and Son, the employers,[1] filed an un-

[1] The petitioner Pacific Maritime Association, an employers' association, appeared for the employers in the court below (Pet. App. 24, n.5).

fair labor practice charge against Local 701 of the International Union of Operating Engineers ("Engineers") alleging that it violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in strike activity in the course of a "jurisdictional" dispute.[2] The Engineers' Union had previously filed a similar charge against Local 50 of the International Longshoremen's and Warehousemen's Union ("Longshoremen"), based on the latter's conduct in the same dispute which centered around whether longshoremen or operating engineers should drive certain cranes at the Astoria, Oregon port.

After determining that there was reasonable cause to believe that the unions were engaging in strike activity proscribed by Section 8(b)(4)(D), the Board's Regional Director consolidated the cases for purposes of hearing and determination of the underlying dispute by the Board, pursuant to Section 10(k) of the Act (Pet. App. 6). Also, pending such determination of the dispute, the Regional Director petitioned the United States District Court for the District of Oregon for temporary injunctive relief under Section 10(*l*) of the Act (Pet. App. 6-

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[2] Section 8(b)(4)(D) of the Act (Pet. App. 1) makes it an unfair labor practice for a labor union to engage in a strike or refusal to work in order to compel "any employer to assign particular work to employees in a particular labor organization * * * rather than to employees in another labor organization * * * unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

7). The district court enjoined both unions from engaging in conduct proscribed by Section 8(b)(4)(D) pending final Board adjudication. The court of appeals affirmed (Pet. App. 8-16).

Following the 10(k) hearing, the Board awarded the work in dispute to the Engineers and ruled that the Longshoremen were not entitled to engage in strike activity to force the companies represented by petitioner to assign the disputed work to them[3] (181 NLRB 315). Thereafter, the Regional Director, consistent with the Board's 10(k) determination, dismissed petitioner's unfair labor practice charge against the Engineers, which action was sustained, on appeal, by the General Counsel (Pet. App. 24).

Petitioner sought review by the court of appeals of the General Counsel's dismissal of the complaint which charged the Engineers with improperly engaging in strike activity to enforce its demands in a jurisdictional dispute. Petitioner also sought review of the Board's denial of its request to stay the 10(k) determination awarding the work to the Engineers. The court of appeals held that it was "without jurisdiction to review either the refusal of the Board to stay its section 10(k) determination, or the dismissal of the employers' charges against the Operating Engineers' union" (Pet. App. 29).[4]

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[3] A petition to review the Board's 10(k) determination was dismissed by the court of appeals for lack of jurisdiction (Pet. App. 24). Petitioner did not seek further review of that ruling.

[4] The court of appeals also vacated the order of the district court which had, pursuant to Section 10(*l*) of the Act, en-

ARGUMENT

1. The opinion of the court of appeals, upon which we principally rely, fully answers petitioner's contentions here. Petitioner's arguments (Pet. 9-16) largely ignore or misconstrue *National Labor Relations Board* v. *Plasterers' Union*, 404 U.S. 116. There, in discussing the statutory procedure for the resolution of jurisdictional disputes and the effect of a 10(k) decision, the Court said (pp. 126-127, footnote omitted):

> But the § 10(k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding; the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10(k) decision against it, a § 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed. Neither the employer nor the

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joined the Engineers' Union from engaging in strike activity to enforce its claims pending final adjudication of the Board. The district court had denied the motion by the Engineers to vacate the injunction. The appeal by the Engineers was consolidated for hearing with petitioner's application.

> employees to whom he has assigned the work are legally bound to observe the § 10(k) decision, but both will lose their § 8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's § 10(k) decision.

The Engineers, "the picketing union" here, prevailed at the 10(k) hearing. As a result, under Section 8(b)(4)(D) it would not commit an unfair labor practice if it engaged in a strike to force the employer to conform to the Board's finding that its members are entitled to the disputed jobs. The Board, therefore, properly dismissed the Section 8(b)(4)(D) charges against the Engineers, and the court of appeals properly vacated the 10(*l*) injunction barring the Engineers from engaging in otherwise prohibited activity in order to compel the employers to reinstate its employees. The decision of the court of appeals is in accord with "the design of the Act," which permits the prevailing union in a 10(k) hearing to resume picketing and "shut down the job" if the employer and the other union fail "to conform to the Board's decision" (404 U.S. at 127).[5] Indeed, the Board has recently emphasized that no other remedy is available to Engineers. *Brady Hamilton Stevedore Co.*, 198 NLRB No. 18, 80 LRRM 1611, decided July 12, 1972.

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[5] Contrary to petitioner's assertion, the language in the opinion in *National Labor Relations Board* v. *Plasterers' Un-*

Petitioner contends, however, that the dismissal of the 8(b)(4)(D) charge at this time is contrary to Section 10(k) of the Act. While that Section authorizes the dismissal of the Section 8(b)(4)(D) charge "[u]pon compliance by the parties to the [jurisdictional] dispute with the decision of the Board * * *," the statute does not preclude the dismissal of the complaint against the prevailing union where, as here, such action is warranted under Section 8(b)(4)(D). *National Labor Relations Board* v. *Plasterers' Union, supra*, 404 U.S. at 127, n. 19.

Petitioner's reliance upon *National Labor Relations Board* v. *Radio and Television Broadcast Engineers*, 364 U.S. 573, is misplaced. There it was held that under Section 10(k) "it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision" (364 U.S. at 586). The Board here complied with that mandate. The decision did not deal with the issue of the dismissal of the Section 8(b)(4)(D) charge prior to compliance by the losing party. Moreover, as the court of appeals held, the order dismissing the Section 8(b)(4)(D) charge is not appealable, and that

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ion, did not merely involve "a description of how the Board is proceeding" (Pet. 11). After setting out "the description," the Court held (404 U.S. at 127):

> This is the design of the Act. * * * We do not find that the legislative history of § 8(b)(4)(D) and § 10(k) requires a different conclusion.

court properly dismissed the petition seeking review of that action (Pet. App. 29).

2. Petitioner's contention that it should be permitted to obtain judicial review of the Section 10(k) determination was fully answered in the court below in dismissing petitioner's application to stay the Section 10(k) order (Pet. App. 29). We merely add that this issue cannot be properly asserted in this petition for a writ of certiorari. The petition of the employers seeking review of the Board's Section 10(k) decision (Pet. App. 17) was dismissed by the court of appeals on September 29, 1970 (Pet. App. 19). The order of the court of appeals here at issue denied petitioner's application to stay the Section 10(k) order, dismissed petitioner's application seeking review of the dismissal of the Section 8(b)(4)(D) charges against the Engineers' Union and vacated the Section 10(l) injunction against the Engineers. The propriety of the Section 10(k) order was no longer in issue before the court of appeals.*

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* Petitioner's contention, that the denial of appellate review of the Section 10(k) order violates its right to due process, is without merit. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301; *Lindsey* v. *Normet*, 405 U.S. 56, 77. Since the Longshoremen continued to claim the work notwithstanding the adverse 10(k) award, and the Board determined that the Longshoremen were engaging in an unfair labor practice in violation of Section 8(b)(4)(D) (Pet. App. 24, n. 4), the propriety of the Section 10(k) determination is subject to review by the court of appeals in connection with review of the 8(b)(4)(D) finding (29 U.S.C. 160(e) and (f)). Indeed, such a challenge to the 8(b)(4)(D) order is pending before the Court of Appeals for the Ninth Circuit on the Board's petition for enforcement (*National Labor Relations Board* v. *Longshoremen's Union*, No. 72-1908).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1972.

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